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No. 98-84

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R.M. SMITH,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE MICHAEL BOWERS, CHAD GANDEN, JUSTIN RAZZANO, THE CENTER FOR SCHOOL CHANGE AND THE AUTISM NATIONAL COMMITTEE IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE[1]

Michael Bowers is a student currently enrolled at Temple University. In the second grade, he was identified as perceptually impaired, the terminology the New Jersey Department of Education uses to identify students with a learning disability. Michael qualified academically for admission to an National Collegiate Athletic Association ("NCAA") member college or university, and several recruited him heavily for their athletic programs. Michael applied and was admitted to Temple University as a regular admission student solely on the basis of his high school academic record. However, the NCAA deemed him ineligible to participate in intercollegiate athletics, practice with any intercollegiate athletes, or receive any athletic scholarship assistance. No member college or university could or would allow him to participate in its athletic program.

Chad Ganden is a student at Michigan State University. Chad was tested for his disability in 1985. In second grade in the West Bloomfield School District in Michigan, the School Psychologist determined that Chad needed special education services. Despite his disability, Chad continued his mainstream education, which his individual

[1] No Counsel for a party authored this brief in whole or in part. No person or entity other than the amici curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

education program team supplemented with special education programs designed to address his disability.

Justin Razzano is a student with a learning disability who attended Immaculata High School and then transferred to Somerville High School in New Jersey. Justin's honors include Who's Who Among American High School Students, Boy Scout of the Year and the Most Valuable Player Award in football and basketball. Justin is described by his teachers as a very friendly, outgoing, energetic young man who is well liked and respected by his peers and teachers.

However, Justin's learning disability impacted his academic performance. He applied for initial eligibility from the NCAA Clearinghouse but was denied the opportunity to participate in intercollegiate athletics or receive an athletic scholarship. He was accepted at St. Peter's College in New Jersey.

These individual Amici are student athletes who qualify as persons with a disability within the meaning of Section 504 of the Rehabilitation Act, 29 U.S.C. § 706(8)(B). All three applied to NCAA member colleges and universities and were denied eligibility because the NCAA Clearinghouse refused to certify any special education courses regardless of their content and refused to acknowledge that the students were entitled to any accommodations under federal or state anti-discrimination laws. Resultantly, the students could not participate in

intercollegiate sports and receive athletic scholarships. Amici students join with the other Amici asking this Court to affirm that the NCAA is covered under federal anti-discrimination laws enacted pursuant to Congress' spending power.

The Center for School Change at the University of Minnesota's Humphrey Institute strongly encourages the United States Supreme Court to find that the NCAA is covered by federal anti-discrimination legislation. Educators, parents and legislators nation wide have asked the Center for School Change for help in improving the nation's public schools. But the NCAA has made the process of improving schools more difficult. The NCAA has placed astonishing standards on high schools. For example, the NCAA says it will not accept for purposes of college preparation any special studies course that spends more than 25% of its time studying current issues or law! Many high schools around the nation are asking "who is the NCAA to pass judgment over our curriculum?"

Recently the Center worked with leading school reform authorities throughout the United States in preparing an "open letter" about problems the NCAA is producing in school reform. Four recent national Teachers of the Year joined educators from across the political spectrum who challenged the NCAA because it is frustrating high school reformers by rejecting research-based courses which have been approved by teachers, administrators, local and state authorities. *Educators*

Cry Foul on NCAA's High School Rules, USA TODAY, Jan. 9, 1998, at 1D.

The NCAA has made it difficult for a number of charter school students to be accepted into universities unless the schools conform to the traditional curriculum. Charters are being created so that students achieve higher academic skills and knowledge - but they should not be held to the NCAA's extremely traditional course standards.

The Autism National Committee is a nationwide organization comprised of approximately 1,000 people with autism, their family members, and nationally-recognized professionals in the field of autism. The Committee's mission is to eradicate illegal discrimination against and unnecessary segregation of people with autism. The Committee also works with universities and governmental agencies to promote research into promising educational and treatment practices for people with autism. Finally, the Committee works to broaden the communication skills and self-advocacy of people with autism, and to increase the role people with autism play in determining their own lives.

INTRODUCTION

This matter is before the Court following a motion to dismiss in the Western District of Pennsylvania from what was unarguably a poorly-drafted complaint by a law student seeking

relief from the discriminatory practices of the largest, most powerful association with responsibility for amateur athletics in the United States. The NCAA, undeniably the only game in town for student athletes who want to compete at the college level, is the collection of 1,200 private and public colleges that determine the policies and procedures for intercollegiate athletics in the country. This association of colleges comes to this Court seeking to extricate its members from any responsibility to the young people who participate in their athletic programs to operate such programs in a manner that does not offend the federal anti-discrimination laws that Congress enacted pursuant to its spending powers, specifically Title IX, 20 U.S.C. §§ 1681-1687, Section 504, 29 U.S.C. § 794(a), and Title VI, 42 U.S.C. § 2000d.

In examining whether the NCAA is subject to federal anti-discrimination laws enacted pursuant to Congress' spending power, one must parse the nature and function of the NCAA. In its brief, the NCAA describes itself as a "voluntary, unincorporated association with some 1,200 members, consisting primarily of public and independent colleges and universities across the county, as well as certain athletic conferences, associations, and other education institutions." Pet. Brf. at 4; *see National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 182 (1988) (NCAA includes "virtually all public and private universities and 4-year colleges

conducting major athletic programs in the United States"). The NCAA is irrefutably the only game in town for student athletes, male and female, with and without intellectual and/or physical limitations, of all ethnic groups, to participate in intercollegiate athletics in this country.

This reality is not by happenstance, but rather is the cumulation of well-considered and well-orchestrated plans. The NCAA determined with panache, coercion and the muscle of its Committee on Infractions to install itself as the arbiter of intercollegiate athletics throughout this nation.

SUMMARY OF THE ARGUMENT

The Third Circuit reasoned that the parties had not briefed the merits of Respondent's claim that Title IX applied to the NCAA, but rather held that the District Court abused its discretion in not allowing Ms. Smith to amend her complaint. *R. M. Smith v. National Collegiate Athletic Ass'n*, 139 F.3d 180, 190 (3d Cir. 1998). That this matter is before this Tribunal with so sparse a record is surprising.

Clearly, the NCAA is an "entity which is established by two or more [colleges or universities]" as defined by Title IX, 20 U.S.C. § 1687, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(b), and Title VI, 42 U.S.C. § 2000d-4a(4). Amici support the NCAA's argument that it is an extension of its member colleges and universities and move that argument to

an examination of the associational nature of the NCAA. Amici argue that the NCAA is its member colleges and universities, and conversely that the member colleges and universities are the NCAA. Amici also concur with the NCAA that the member colleges and universities receive federal financial funds and therefore are covered entities within the meaning of the federal anti discrimination statutes enacted pursuant to the Spending Powers Clause.

An analysis of the legislative history of the Civil Rights Restoration Act of 1987 (CRRA), Pub. L. No. 100-259, 102 Stat. 28 (1988), and the federal laws that the Act sought to reinforce, specifically Title IX, Section 504 and Title VI, clearly indicate that the Congress intended that these laws apply to all of the programs and activities connected with the nation's colleges and universities. Any attempt by the NCAA to escape the jurisdiction of these statutes is unconscionable and inconsistent with our system of jurisprudence.

Amici are concerned that the sweep of Petitioner's brief is so broad that a decision in its favor by this Court would impact negatively on persons with disabilities. Although the instant case was brought pursuant to Title IX, Petitioner's argument is infused with a petition to this Court to further limit Congress' intent under Section 504 to ensure that persons with disabilities are fully included in all aspects of the society.

ARGUMENT

I. THE NCAA IS AN EXTENSION OF ITS MEMBER COLLEGES AND UNIVERSITIES WHEN THE ISSUE TO BE DETERMINED IS WHETHER IT RECEIVES FEDERAL FINANCIAL ASSISTANCE.

The NCAA is an unincorporated association of approximately 1200 colleges and universities. Virtually all universities and four-year colleges conducting major athletic programs in the United States are members of the NCAA.[2]

The association is composed principally of public and private colleges and universities, many of which undeniably trigger coverage under Title IX, Section 504 of the Rehabilitation Act and Title VI, all statutes enacted pursuant to the Congress' spending powers. Pet. Brf. at 3. Petitioner

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2 The formation of the NCAA was traced to one particular problem -- the need for rules to curb violence in intercollegiate football at the commencement of this century. Thus, in its beginning the NCAA's stated objective was to maintain college activities 'on an ethical plane in keeping the dignity and high purposes of education.' The growth of the NCAA beyond its primary work of salvaging football and structuring a formal organization has, indeed, been spectacular. From its humble beginnings and rule-making pertaining to one sport, the organization, and its responsibilities, continued to grow and, in 1973, it was organizationally and procedurally revised. Currently, some of its more important organizational purposes are in the area 1) enforcement, 2) championships, 3) education, 4) broadcasting, 5) rule-making and 6) faculty control and eligibility standards.

National Collegiate Realty Corp. and the NCAA v. Board of County Commissioners of Johnson County, Kansas, 236 Kan. 394, 396, 690 P.2d 1366, 1369 (1984).

NCAA's argument is predicated on the proposition that its associational status somehow distinguishes it and distances it from the obligations and liabilities of its member institutions that the NCAA does not deny are bound to uphold the federal anti discrimination laws enacted pursuant to the Spending Powers Clause.

The NCAA argues that member institutions, as a matter of law, may avoid responsibility for discriminatory behavior if they form an association and individually claim to be bound by its rules, while jointly (in the guise of the association) paying homage to the notion of "member institution control." This argument not only contravenes the language of the statutes, but is fundamentally at odds with established common law agency principles. The NCAA attains no protected status by virtue of its being an unincorporated association. "An association has no legal entity separate and apart from the members of which it is composed." *Kansas Private Club Ass'n and Wyandotte Club Ass'n v. Landerholm*, 196 Kan 1, 2, 408 P.2d 891, 892 (1965).

Under the common law, the NCAA as an association has no greater legal status than a "joint venture" of its membership, virtually every college and university in the United States. "[T]he general rule is that unincorporated associations have no such legal existence as will permit them to acquire and hold property in the associate name either by purchase or gift, and that property ostensibly held by such unincorporated bodies is

deemed to belong to the members jointly or as tenants in common." *Murray v. Sevier*, 156 F.R.D. 235, 244 (D. Kan. 1994), *citing* 6 Am. Jur. 2d Associations and Clubs §§ 1, 23 (1963).[3]

As an association, the NCAA is "not a legal entity separate and distinct from the persons who comprise its membership" which "derives its existence 'from the consensual agreement of the component members, who act not by a distinct entity but by virtue of mere agency'." *Bango v. Ward*, 12 N.J. 415, 421, 97 A.2d 147, 149 (1953)(Brennan, J.), *quoting Harker v. McKissock*, 12 N.J. 310, 96 A.2d 660; *Murray*, 156 F.R.D. at 244-245, *citing* 7 C.J.S. Associations §§ 2-3, 35, 26 (1980)(an "association", unlike a corporation, is merely a creature of contract, not a legal entity distinct from its component members).[4]

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[3] To avoid the conflict with the common law as applied in matters related to the ownership of property, the NCAA, with the consent of its member colleges and universities, created and incorporated the National Collegiate Realty Corporation, a Kansas "for profit" corporation wholly owned by the NCAA, on June 25, 1970, to "hold title to property, collect income therefor, and turn over the entire amount thereof, less expenses, to the National Collegiate Athletic Association." *National Collegiate Realty Corp.*, 236 Kan. at 396, 690 P.2d at 1369.

[4] There is no dispute that the common law of associations applies to the NCAA for matters related to business. It is further clear from the actions of the members, creating the Realty Corporation giving it the power to hold property, that the NCAA understands and applies the common law in its business dealings. It would be inconsistent to propose a different standard when dealing with matters affecting the civil rights of students attending this nation's colleges and universities.

A. THE NCAA IS A MERE SURROGATE OF ITS MEMBER INSTITUTIONS, THE PUBLIC AND PRIVATE COLLEGES AND UNIVERSITIES OF THIS COUNTRY THAT INDISPUTABLY RECEIVE FEDERAL FINANCIAL ASSISTANCE.

The NCAA is its member institutions. Conversely, the member institutions are the NCAA. "As an unincorporated association, the NCAA is simply a collection of individual members." *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 461 (1980). The member colleges and universities, as the collective membership, affect the policies and operating procedures and use the Association to speak with one voice. *Tarkanian*, 488 U.S. at 193.

The member institutions of the NCAA pay dues to the organization from federal funds that are meant to benefit the colleges and universities that are the recipients.[5] *Grove City College v. Bell*, 465 U.S. 555, 564 (1984) held that where a college receives federal funds in the form of student financial

[5] NCAA members pay annual dues to the Association, $1,800 for Division I members and $900 for Division II members. The Association in turn acts as a clearinghouse to divide proceeds received from sponsored activities. In 1980, the members divided the television football revenues so that Division I members received $27,842,185 (89.9%); Division II members received $625,195 (2%); Division III members received $385,195 (1.3%); and, the Association received $2,147,425 (6.9%). *National Collegiate Athletic Association v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 n. 10 (1984)(hereinafter *Board of Regents*).

aid, such funds benefit the college, obliterating any distinction between direct and indirect recipients of federal funds.[6]

The growth and influence of the NCAA since 1973 when the member colleges and universities revised the Association has been phenomenal, and every step of this growth has been accomplished with the advice and consent of the members. The presidents of the member colleges and universities are required to sign assurances affirming that their respective institutions are in compliance with the Association's Bylaws[7] that they have drafted. Don Yaeger, UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL 13 (1991).

The Executive Committee of the NCAA "shall consist of 14 members, including at least three women. The president and secretary-treasurer shall be ex officio members with voice and vote and shall be chair and secretary, respectively, of the Executive Committee." NCAA Bylaw Art. 4.2.1. The

[6] *Kemether v. Pennsylvania Interscholastic Athletic Ass'n*, 15 F. Supp. 2d 740 (E.D. Pa. 1998) is similar to the case presented here. In *Kemether*, the district court ruled that the PIAA, an athletic association comprised of Pennsylvania high schools, was an indirect recipient of federal funds subject to Title IX because its member high schools receive federal funds. *Id., citing Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 271-72 (6th Cir. 1994).

[7] The NCAA Bylaws are the Constitution, Operating and Administrative Bylaws and the Administrative Organization reviewed annually at the Convention and that the members vote to revise or not in whole or in part. All references to the Bylaws refer to the Bylaws as published in the 1995-96 NCAA Manual.

Executive Committee is responsible for transacting the business and administering the affairs of the Association.

B. THE NCAA IS AN EXTENSION OF ITS MEMBER COLLEGES AND UNIVERSITIES.

The NCAA has argued and prevailed on the issue that it is an educational institution and no more than its members; therefore, it too should be exempt from state taxes in the same manner that its member institutions are under Kansas law.

> The activities of the NCAA are of the type the member universities and colleges could accomplish by committee except for the number of schools involved and the complexity of the world of major intercollegiate sports. The work of the NCAA staff is that which the members have decreed it shall do for the mutual benefit of, and assistance to, the member institutions' educational programs. We must conclude that the NCAA is but an extension of the member universities and colleges and there is no legislative intent that the extension should be denied the exemption available to the member colleges and institutions.

National Collegiate Athletic Ass'n v. Kansas Dept. of Revenue, 245 Kan. 553, 559, 781 P.2d 726, 730 (1989).

The policies, bylaws and operating procedures for the Association are drafted, revised, accepted and governed by these same member institutions that receive federal financial funds and that have agreed through signed assurances to uphold

federal anti-discrimination laws enacted under the Spending Clause.[8] Conventions are held annually when the polices that direct the operation of the Association are determined and voted on by the member institutions.[9] "Between conventions, the Association is governed by its Council, which appoints various committees to implement specific programs." *Tarkanian*, 488 U.S. at 183.[10]

C. THE PUBLIC AND PRIVATE COLLEGES AND UNIVERSITIES THAT ARE ITS MEMBERS HAVE DELEGATED AN ESSENTIAL, TRADITIONAL STATE FUNCTION TO THE NCAA.

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[8] While Amici herein argue that the NCAA is its member institutions, they also accept the arguments presented by Amici the National Trial Lawyers Association that the NCAA is a recipient of federal funds. Amicus Michael Bowers has obtained discovery from the NCAA affirming that as a representative of its members, the NCAA has received federal financial assistance through a contractual arrangement with federal agencies and its staff and officers, appointed and confirmed by the member colleges and universities, have signed the required assurances and thus entered into a contractual agreement to abide by the provisions of Title IX, Section 504 and Title VI.

[9] The Convention meets annually during the second week in January to consider and adopt legislative measures for the conduct of the Association. NCAA Bylaw Art. 5.1.1.

[10] The Council consists of 46 members, including the president and secretary-treasurer, twenty-two Division I members, and eleven members from Divisions II and III respectively. NCAA Bylaw Art. 4.1.1. The Council has, among other responsibilities, the power to establish and direct the general policy of the association in the interim between conventions NCAA Bylaw Art. 4.1.3.

"[Education] is perhaps the most important function of state and local governments ... required in the performance of our most basic public responsibilities." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). The NCAA Bylaws identify its fundamental purpose "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body." NCAA Bylaw Art. 1.3.1. The member colleges and universities have relegated an essential function to the NCAA as their governing board responsible for the overseeing the operation of intercollegiate athletics. Many of the member colleges are public entities whose function are prescribed by state laws.

> In pursuit of its fundamental goal and others related to it, the NCAA imposes numerous controls on intercollegiate athletic competition among its members ... Thus, the NCAA has promulgated and enforced rules limiting both the compensation of student-athletes, ... restricted the number of athletic scholarships its members may award, and established minimum academic standards for recipients of those scholarships; and it has pervasively regulated the recruitment process, student eligibility, practice schedules, squad size, the number of games played, and many other aspects of intercollegiate athletics.

Board of Regents, 468 U.S. at 122-123 (citations omitted) (White, J. joined with Rehnquist, J. dissenting).

The NCAA is involved exclusively with regulating and promoting intercollegiate athletic events among its member colleges and universities. There is no serious contention that, generally speaking, physical education and sports programs in universities are not within proper "educational purposes" and we must conclude they are educational. *National Collegiate Realty Corp.*, 236 Kan. at 400, 690 P.2d at 1372.

II. IT SHOCKS THE CONSCIENCE THAT THE NCAA SEEKS TO DISAVOW ITSELF OF ANY RESPONSIBILITY FOR UPHOLDING FEDERAL ANTI-DISCRIMINATION LAWS.

Although ironic that the NCAA would seek to obviate itself of all responsibility for upholding federal anti-discrimination laws, this practice is consistent with the practices of this Association that insists its primary purpose is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body." NCAA Bylaw Art. 1.3.1.

A. PRIOR TO TITLE IX, THE NCAA HAD LITTLE CONCERN FOR ATHLETIC COMPETITION FOR FEMALES.

The passage of Title IX in 1972 saw a surge of interest in women's intercollegiate athletic competition. This Congressional demand for equity among males and females was tied to the spending powers and put a demand on the colleges and universities of the country that they spread their resources equally between male and female athletics or risk losing federal financial assistance in all of the programs and activities of the institution. Title IX specifically applied to college athletics. As Caspar Weinberger, then-Secretary of the U.S. Department of Health, Education, and Welfare, testified in 1975:

> The final regulation [under Title IX] applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives Federal Funds for any of those programs. If Congress wished to excluded [sic] athletics, for example, as so many people seem to wish, Congress could have easily have said so. However, Congress ... made very clear athletics should be covered by the regulation.

S. Rep. 100-64 at 9-10 (Jun. 5, 1987), *quoting* Hearings Before the Subcommittee on Post Secondary Education of the Committee on Education and Labor, U.S. House of Representatives (Jun. 26, 1975) at 438.

The Association for Intercollegiate Athletics for Women (AIAW) had heretofore been the unchallenged regulatory organization for female athletes in the country's institutions of higher learning. Financial expenditures for women's sports increased in the wake of the passage of Title IX. Suddenly it was worth the effort of the NCAA to acknowledge the existence of female athletes. Rather than co-exist with the AIAW, the NCAA elected to challenge its very survival.[11]

The coffers of the AIAW were no match for those of the NCAA; at the time, many colleges and universities had not invested in an athletic program for women and it did not have the number of members or the organizational clout that the NCAA had. Under siege from the NCAA, the AIAW could not compete financially with the resources and power of the combined efforts of the member institutions of the NCAA.

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11 The AIAW, its importance and financial strength bolstered by Congress's action, negotiated its own television contract for women's championships. AIAW leaders also began talks with [Walter] Byers [then executive director of the NCAA] about granting equal status to women's athletics, allowing each NCAA member university one vote for men's athletics and one vote for women's athletics at its convention. The idea would have significantly changed the way the NCAA did business -- since 90 percent of those voting at conventions are men -- and could have opened the NCAA's financial coffers to the burgeoning demands of rapidly expanding women's programs.

UNDUE PROCESS at 10-11.

As a matter of historical record, the initial involvement of the NCAA in women's athletics was less an act of enlightened altruism than a tactical maneuver contrived by some of the organization's members to fend off potential gender discrimination challenges invoked in the wake of Congress' 1972 enactment of Title IX. *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass'n*, 558 F. Supp. 487, 492 (D.D.C. 1983). Formal NCAA consideration regarding the inclusion of women's sports in the intercollegiate association's activities began at its annual convention in January 1978. *Id.* At that time, the NCAA was firmly rooted in the chauvinist tradition that had attended its creation as an all-male intercollegiate sports concern. However, the pragmatism of the NCAA officials in light of the enormous consequence of potential liability overcame the institutional inertia against including women's sports in the purview of the organization. Having committed itself to the governance of women's athletics, the NCAA aggressively enticed the member institutions that were previously aligned with its pre-existing rivals to associate themselves with its own fledgling enterprise. It accomplished this by aggressively undercutting the other sports governing bodies, spending $3 million in the first year for a $500,000 return on its women's athletics program. UNDUE PROCESS at 11. In short order, the NCAA rose to become the dominant governing body of women's intercollegiate athletics,

rendering competing women's athletic associations defunct in the process. *Id.*

In the present case, the NCAA, having effectively attained monopoly status among associations governing both men's and women's intercollegiate sports, seeks to deny that it is subject to liability under Title IX. The NCAA has gone in less than twenty years from eagerly wrapping itself in the mantle of Title IX in refutation of those who might charge it with gender discrimination to casting Title IX aside as a meaningless constraint on the activities of a wholly exempt enterprise. The irony of this position is matched only by its hypocrisy. The NCAA leadership was prescient in the 1970's in their apprehension that Title IX would indeed be applicable to its activities and consequently impose liability. The organization should not be permitted to deny cavalierly liability under Title IX while simultaneously reaping the benefits of its unattenuated status as a recipient of the funds that so clearly impose Title IX liability.

B. AS CASE LAW AND LEGISLATIVE HISTORY SHOW, CONGRESS INTENDED SECTION 504 TO COVER THE NCAA.

Congress intended the Rehabilitation Act to cure the Nation's "failure to recognize the intrinsic rights of the handicapped." Timothy M. Cook, *The Scope of the Right to*

Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws, 20 LOY. L.A. L. REV. 1471, 1478 (1987). Three years of hearings prior to Section 504's enactment made clear to the lawmakers that "although access would entail burdens, eliminating the evil of exclusion would economically and morally outweigh the costs." *Id.* at 1478-79.

Section 504 signaled a broad Congressional intent to stop federal funding, both directly and indirectly, of programs and activities that discriminate. Congress intended Section 504 to remedy the nation's "shameful oversights" that caused persons with disabilities to be "shunted aside, hidden, and ignored." *Alexander v. Choate*, 469 U.S. 287, 296 (1985), *quoting* 117 Cong. Rec. 45974 (1971)(comments of Rep. Vanik). Section 504 is "commonly known as the civil rights bill of the disabled." *Helen L. v. DiDario*, 46 F.3d 325, 330 (3rd Cir. 1995), *quoting ADAPT v. Skinner*, 881 F.2d 1184, 1187 (3rd Cir. 1989). Congress modeled Section 504 after other federal civil rights statutes, and Section 504's language is substantially similar to that of Title IX and other civil rights laws governing federally-assisted programs. *Helen L.*, 46 F.3d at 330 n. 8.

In stark contrast to Congress's goals in enacting Section 504, the NCAA bylaws on initial eligibility reject the notion that students with disabilities should or could compete in intercollegiate athletics until they have proven themselves

capable in a way that is discriminatory and that poses an undue burden on these students for their own protection. NCAA Operating Bylaws Art. 14.3.1.3 (1996-96)("Courses that are taught at a level below the high school's regular academic instruction level (e.g., remedial, *special education, or compensatory*) shall not be considered core courses *regardless of course content"*)(emphasis added).

It is undisputed the NCAA's member institutions, who constitute the majority of the NCAA, are subject to Section 504 as federally-assisted programs.[12] The NCAA, however, is attempting to exempt itself from the nation's broad rejection of discrimination under Section 504 by disingenuously invoking the Civil Rights Restoration Act. Yet the CRRA's legislative history clearly and undisputably shows Congress's intent to strengthen Section 504 and other civil rights statutes and reject the narrow and erroneous interpretations of Title IX and Section 504 in *Grove City College v. Bell*, 465 U.S. 555 (1984) and *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

As explained in the CRRA's accompanying committee report, Congress enacted the CRRA to overturn *Grove City College* and *Consolidated Rail Corp.* to the extent those cases narrowed the coverage of federal civil rights laws. In those

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[12] The Office of Civil Rights of the U.S. Department of Education has also held this and other NCAA Bylaws violate Section 504. Letter from Jeanette J. Kim, Director, Policy, Enforcement, and Program Service, Office of Civil Rights, to Daniel Dutcher (May 23, 1994), attached hereto as Appendix "A".

decisions, the Court held that Title IX and Section 504 respectively covered only those programs directly receiving federal funds, and excluded other programs even when part of the same entity. S. Rep. 100-64 at 3 (Jun. 5, 1987). Congress quickly reacted, holding it had meant Section 504 to cover broadly all programs within federally-assisted programs or activities regardless of whether the actual activity in question received federal funding. Congress concentrated particularly on eradicating discrimination from all activities of federally-funded educational institutions, which constitute the NCAA's entire membership. The committee report held, "For education institutions, the bill [S.B. 557, the CRRA] provides that where federal aid is extended anywhere within a college, university, or public system of higher education, the entire institution or system is covered." *Id.* at 4.

The committee report noted Congress had intended broad coverage of Section 504 and explicitly rejected the argument that a program could subdivide its activities into federally funded and non-federally funded programs, thus perpetuating discrimination against people with disabilities and rendering meaningless the goals and aspirations of Congress in enacting Section 504. *Id.* at 6-7; *see Alexander v. Choate*, 469 U.S. at 297 (Congress' "statements would ring hollow" under narrow interpretation of Section 504). As the Committee concluded:

> The inescapable conclusion is that Congress intended that Title VI as well as its progeny -- Title IX, Section 504, and the ADA[13] -- be given the broadest interpretation. All four statutes were passed to assist in the struggle to eliminate discrimination from our society by ending federal subsidies of such discrimination. Congress understood that these goals could be achieved if the Federal government used its power and authority to end discrimination.

S. Rep. 100-64 at 7.

The Committee also commented on a number of cases, decided after *Grove City College*, that the Committee described as "the casualties of the *Grove City* decision." *Id.* at 14. These cases stood for the same rejected principle for which the NCAA now argues -- that a federally-funded program can exclude people with disabilities without regard to Section 504 merely by shifting funding to specific activities at specific times. In a case strikingly similar to the NCAA's position, a firefighter could not sue the fire department because his program received no federal funds, even though revenue sharing funds could have been distributed to the fire department. *Id.* at 14-15, *citing Foss v. City of Chicago*, 640 F. Supp. 1088 (N.D. Ill. 1986).

Finally, the Committee clearly noted Congress' intent to define "ultimate beneficiaries" as persons for whom the federally-financed program was ultimately designed to benefit.

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[13] ADA refers to the Age Discrimination Act.

Such persons were excluded from coverage under Section 504. As the report shows, Congress clearly intended to limit "ultimate beneficiaries" to those persons the program was designed to help: Congress cited as examples of ultimate beneficiaries "persons receiving social security benefits, persons that receive Medicare and Medicaid benefits, and individual recipients of food stamps." *Id.* at 24-25.

Similarly, in *Department of Transp. v. Paralyzed Veterans*, 477 U.S. 597 (1986), the Court held (and Amici do not dispute) that entities who merely benefit from federal financial assistance are not covered under Section 504. In *Paralyzed Veterans*, the Court ruled Section 504 did not cover airlines merely by virtue of the benefits they receive from federal financed airports. The Court recognized that most federal financial assistance has "economic ripple effects" and declined to extend Section 504 to cover the wide range of persons who benefit from federally-funded airports, including passengers and airport workers. *Id.* at 607-10.

The NCAA cannot reasonably argue it falls within the definition of an ultimate beneficiary similar to airlines or Medicaid recipients. Congress' examples of ultimate beneficiaries clearly unmask the basic flaw in the NCAA's argument: the NCAA directly administers and sets policy for, rather than benefits from, the athletic programs of its federally-

funded member universities. As such, *Paralyzed Veterans* is distinguishable from this case.

The NCAA effectively argues for the rejected principle that colleges and universities should be able to avoid the nation's civil rights laws by delegating certain programs to "private" organizations of which they are members--in fact, of which they are the *only* members.[14] In enacting the CRRA, Congress specifically rejected the idea that federally-funded colleges and universities could re-position or separately designate programs to avoid civil rights laws. This Court should

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[14] The NCAA's brief quotes a statement from S. Rep. 100-64 concerning Catholic dioceses as proof that Congress meant to exclude the NCAA from "institution-wide coverage" under civil rights laws. Forgiving the NCAA's failure to list the correct page number for the quote, the NCAA takes the Committee's statement wholly out of context. S. Rep. 100-64 states that private corporations, commissions, and public-private partnerships receiving federal assistance are covered as a "program or activity" under Section 504, and the coverage can extend to the entire corporation. *Id.* at 19. The Committee wrote, "The governmental or public character helps to determine institution-wide coverage." Only then does the NCAA-quoted passage concerning Catholic dioceses appear *Id.* at 19.

Again, the NCAA's attempts to identify itself with the example of the Catholic diocese clearly contravenes federal civil rights laws. The NCAA, an unincorporated association of federally-funded member institutions, is the sole governing body for thousands of university athletic programs. As the Committee Report shows, intercollegiate athletic programs are covered by Title IX. S. Rep . 100-64 at 9. The NCAA's role in administering these programs is wholly public in nature, thereby rendering any analogy with the Catholic diocese example as irretrievably flawed.

In any event, the NCAA is indistinguishable from its member colleges and universities, thus rendering the above analysis irrelevant

likewise reject the NCAA's backward, cramped, and invalid view of the nation's civil rights laws.

CONCLUSION

For the foregoing reasons, Amici urge this Court to affirm the Third Circuit's decision in this case.

Respectfully submitted,

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December 8, 1998

APPENDIX "A"

UNITED STATES DEPARTMENT OF EDUCATION

MAY 23 1994

Mr. Daniel Dutcher
Director, Legislative Services
National Collegiate Athletic
Association
6201 College Boulevard
Overland Park, Kansas 66211-2422

Dear Mr. Dutcher:

This letter is a follow-up to our April 26, 1994, teleconference. As expressed during the teleconference, the Office for Civil Rights (OCR) has serious concerns that certain National Collegiate Athletic Association (NCAA) Bylaws may operate discriminatorily to exclude qualified individuals with disabilities from participation in intercollegiate athletics programs, or render such individuals ineligible to receive certain benefits, including financial aid, in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulations, at 34 C.F.R. Part 104, as well as Title II of the Americans with Disabilities Act of 1990 (ADA), and its implementing regulations, at 28 C.F.R. Part 35. Section 504 applies to programs and activities that receive Federal financial assistance. Title II of the ADA applies to public entities, including public colleges and universities. Specifically, of concern to OCR is the potential adverse impact on individuals with disabilities of NCAA Bylaws 14.3.1.3, 14.3.1.7.5, and 14.1.6.2.2, as reflected in the 1993-94 NCAA Manual.

NCAA Bylaw 14.3.1.2, which concerns core-curriculum requirements for freshman athletes enrolling in Division I and II institutions, provides that, for purposes of meeting the core-curriculum eligibility requirements for financial aid, practice and competition at Division I and II member institutions, certain courses, "(e.g., remedial, special education or compensatory) shall not be considered core courses regardless of course content." With regard to student-athletes with disabilities, subsection 14.3.1.2.5. further provides that "[t]he NCAA Academic Requirements Committee may approve the use of high-school courses for the learning disabled and [other disabled students] to fulfill the core course requirements if the high-school principal submits a written statement to the NCAA indicating that students in such classes are expected to acquire the same knowledge, both quantitatively and qualitatively, as students in other core courses."

I understand, based on our teleconference, that the purpose underlying the cited NCAA Bylaws is to ensure that students that participate in athletics at the Division I and II levels are academically prepared to meet the rigors of both an educational and athletic program and to benefit from the educational program. We strongly support and encourage the NCAA's goal of ensuring that student-athletes learn and benefit from the education that they are offered.

However, OCR is concerned that, as applied by recipients of Federal funding or public colleges and universities, the above-referenced Bylaws may violate Section 504 or Title II of the ADA. Under the Section 504 implementing regulations, a recipient may not use criteria that have the effect of subjecting qualified individuals with disabilities to discrimination. 34 C.F.R. § 104.4(b)(4). Under the regulations implementing Title II of the ADA, a public entity may not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. 28 C.F.R. § 35.130(b)(8).

Additionally, Section 504 and its implementing regulations, as well as Title II and its implementing regulations, require that colleges and universities make reasonable modifications in policies, practices or procedures (including academic adjustment of non-essential requirements), as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating on the basis of disability against qualified applicants or students. 34 C.F.R. § 104.44(a); 28 C.F.R. § 35.130(b)(7).

We do not find a sufficient basis to conclude that meeting the NCAA core course requirement is essential for every student at every Division I or II institution, in order to participate in the athletics program alongside the institution's academic program. Given the wide variation in the academic competitiveness of colleges and universities, the academic programs they offer, and the academic program elected by any given student, many students with disabilities may be able to participate athletically and succeed academically in the program and institution they select, regardless of whether they meet the specific NCAA core-curriculum requirements. Therefore, we believe that under Section 504 and the ADA, some accommodation or academic adjustment of the core-course requirement may be required in some cases.

Bylaw 14.3.1.2 does not appear to allow for accommodation or academic adjustment by NCAA Division I and II member institutions for qualified students with disabilities. The special

certification requirement, applicable only to disabled student-athletes, appears to attempt to provide some flexibility with regard to accommodating academically the needs of individuals with disabilities in meeting core academic requirements. However, even as modified, the core course requirement is inflexible in that the disabled student still must meet core course requirements virtually equivalent to those for nondisabled students. The inability of a high school principal to provide the required certification would result in an exclusion of otherwise qualified disabled student-athletes from participation in Division I and II intercollegiate athletics programs.

In light of the above-referenced concerns, OCR requests that, with regard to NCAA Bylaws 14.3.1.2 and 14.3.1.2.5, NCAA staff seriously consider allowing Division I and II member institutions more flexibility with regard to the use of certain high-school courses (including remedial and special education courses) in meeting NCAA core-curriculum requirements.

OCR also is concerned that, as applied by federally funded or public colleges and universities, NCAA Bylaw 14.1.6.2.2. also may violate Section 504 or Title II of the ADA. Bylaw 14.1.6.2.2 provides that, "[a]t the time of competition, the student-athlete shall be enrolled in not less than 12 semester or quarter hours, regardless of the institution's definition of a minimum full-time program of studies." The NCAA 12-hour rule requires that Division I, II, and III member institutions exclude from intercollegiate athletics competition otherwise qualified individuals with disabilities who, because of their disabilities, are unable to carry 12 semester or quarter hours.

As noted previously, NCAA member institutions that are within the coverage of Section 504 or Title II of the ADA, are required to make such reasonable modifications to or academic adjustments of nonessential academic requirements as are necessary to ensure that academic requirements do not discriminate against qualified students with disabilities. In our teleconference, you indicated that the basis for the 12-hour rule, like the core course requirement, is to ensure that students are receiving the benefit of an education as well as participating in athletics.

We do not find a basis on which to conclude that carrying 12 semester or quarter hours is essential to achieve this purpose for every student-athlete with a disability at every institution. A student with a disability may be fully participating in the educational program, while carrying a reduced course load as an accommodation. Therefore, we believe that reasonable modification or academic adjustment of this requirement may be required in some cases. An otherwise qualified disabled student may not be excluded from participation in an intercollegiate athletics competition on the basis that, because of a disability, he or she is unable to carry a 12 semester or quarter hour course

load. See 34 C.F.R. § 104.4(b)(1)(i); 28 C.F.R. § 35.130(b)(1)(i).

During the April 26 teleconference with members of my staff, it was stated that legislation is expected to be introduced which, if enacted, would amend the 12-hour rule to permit disabled students enrolled in fewer than 12 semester or quarter hours of study to meet the NCAA full-time enrollment requirement. However, it was expressed that, as currently drafted, Bylaw 14.1.6.2.2 does not incorporate an exception or waiver provision with respect to qualified disabled students.

With regard to Bylaw 14.1.6.2.2., OCR requests that NCAA staff amend the 12-hour rule to permit member institutions to effectively accommodate the disabilities of disabled student-athletes. OCR further requests that the NCAA permit Division I, II, and III member institutions to grant exceptions to or waivers of the 12-hour rule for otherwise qualified individuals with disabilities, pending amendment of Bylaw 14.1.6.2.2.

The above-referenced issues and concerns are important to OCR. We would appreciate your giving these matters the utmost consideration.

Sincerely,

Jeanette J. Lim
Director
Policy, Enforcement, and
Program Service
Office for Civil Rights

cc: Francis Canavan, Group Executive Director for Public Affairs, NCAA